Supreme Court, U.S.
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No. 90-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,
v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

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REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

TO THE SUPREME COURT OF THE UNITED STATES:

Since the time that Petitioner The Celotex Corporation ("Celotex") filed its Petition for Writ of Certiorari in this matter, this Court has issued its opinion in *Pacific Mutual Insurance*

Company v. Haslip, 499 U.S. _____, 59 U.S.L.W. 4157 (March 4, 1991). *Haslip* is a clear recognition by this Court that due process imposes limits upon a jury's discretion to award punitive damages. Although the court below realized that "a strong arguable basis exists for applying the due process clause of the United States and Texas Constitutions to a jury's award of punitive damages in a mass tort context," App. A-18-19, the court affirmed the award of punitive damages against Celotex with "misgivings." App. A-24.[1] *Haslip* has now established the analytical framework within which the due process claims of Celotex can be examined. For the reasons set forth below, *Haslip* requires that the award of punitive damages against Celotex be vacated. Alternatively, the cause should be remanded to the Fifth Circuit for further proceedings in light of the *Haslip* decision.[2]

TEXAS LAW ON PUNITIVE DAMAGES DOES NOT SATISFY THE STANDARDS RECOGNIZED IN HASLIP

Most of Respondents' Brief in Opposition is occupied in attempting to clothe the Texas system of punitive damages with the constitutional imprimatur granted the Alabama system in *Haslip*. Despite their best attempts, Respondents' efforts must fail. A careful review of what transpired below establishes that most of the critical safeguards which exist under Alabama law were not available to Celotex under Texas law.

The *Haslip* decision placed significant emphasis on the comprehensive scheme of appellate review of punitive awards

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1 The court below felt that it was bound by the en banc decisions of the Fifth Circuit in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (1985) and 781 F.2d 394 (1986). In fact, neither of the *Jackson* decisions addressed a due process challenge to multiple punitive damages awards. Even if they had, those decisions are not binding on this Court, and their authority is dubious in light of the *Haslip* decision.

2 Since *Haslip*, this Court has granted certiorari in several cases involving challenges to punitive damage awards and remanded those cases for further proceedings in light of *Haslip*. *See, e.g., Inter Continental Life Ins. Co. v. Lindblom*, No. 90-1284 (April 15, 1991).

undertaken by the Alabama Supreme Court. After conducting a comparative analysis, the punitive award is reviewed in light of seven objective criteria established by prior decisions of the Alabama Supreme Court. The application of these factors "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" because those objective factors "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." [3] 59 U.S.L.W. at 4162. The *Haslip* opinion relied on the use of these factors to distinguish the Alabama system from Vermont and Mississippi law which allow punitive awards to be set aside only if they are "manifestly and grossly excessive" or the result of "passion, bias and prejudice." 59 U.S.L.W. at 4162 n. 10.

Texas law does not provide any comparable safeguards. Although Respondents suggest that *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), has set forth five factors a Texas appellate court is to consider in reviewing punitive awards,[4] both the Texas Supreme Court and the Fifth Circuit have realized that the vague and lofty language offered by *Kraus* is meaningless and the protection *Kraus* purports to offer is illusory, resulting in a system with no greater objective standards than those utilized by Vermont and Mississippi. Long after *Kraus*, the Texas Supreme Court recognized that the requirement of a reasonable relationship between actual and punitive damages "is merely a tool to aid the courts in determining when an exemplary damage award is the product of 'passion rather than reason.'"

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3 Alabama law also requires the trial court to scrutinize a punitive award in light of these factors and "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages." *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986). Texas law imposes no such requirement on Texas trial courts.

4 Two of the factors enunciated in *Kraus* are the "situation and sensibilities of the parties" and "the extent to which the defendant's conduct offends the public sense of justice and propriety." 616 S.W.2d at 910. These are a far cry from the objective criteria mandated by the Due Process Clause.

Wright v. Gifford-Hill & Co., Inc., 725 S.W.2d 712, 714 (1987), quoting *Tynberg v. Cohen*, 13 S.W.2d 315, 316 (Tex. 1890). In *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1046 (5th Cir. 1984), the Fifth Circuit stated that its authority to reduce excessive jury awards was limited to those awards that were so large as to "shock the judicial conscience" or that were so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive." *See also Capital Title Co., Inc. v. Donaldson*, 739 S.W.2d 384, 392 (Tex. App. - Houston [1st Dist.] 1987, no writ) (reaffirming that a punitive award will not be set aside as excessive unless it is "so large as to indicate that it is a result of passion, prejudice, or corruption, or that the evidence has been disregarded.")

Haslip did not reach the central issue posed by Celotex in this case: the due process limitations on multiple punitive damage awards for a single course of conduct. However, the Alabama system sanctioned in *Haslip* requires both trial and appellate courts reviewing a punitive damage award to consider "the existence of other civil awards against the defendant for the same conduct." 59 U.S.L.W. at 4162. Texas law provides no mechanism for consideration of other civil awards against the defendant. Thus, even though Celotex offered evidence of other punitive awards against it, App. G-K, there was no procedure under Texas law available to the courts below to vacate or reduce the punitive award against Celotex because of those other awards. As *Haslip* recognized, due process requires consideration of other such awards as a necessary check on the unlimited discretion of the factfinder.

The problems raised by repeated punitive awards based on a single course of conduct have been a source of concern for over twenty years, beginning with Judge Friendly's prophetic warning that "[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). As mass tort litigation has grown, so has judicial concern over the fundamental unfairness caused by multiple punitive recoveries. *See* Celotex's Petition for Writ of Certiorari at pp. 14-

16. The Fifth Circuit's affirmance of the punitive award against Celotex in this case "with misgivings" is a clear signal that the lower courts are seeking guidance on the constitutional limits on multiple punitive awards against a single defendant. Yet Texas law is devoid of any limitations on the discretion of juries to repeatedly award punitive damages against companies such as Celotex. *Haslip* is a statement by this Court that due process requires more.[5]

The *Haslip* opinion also focused on the guidance the jury instruction given under Alabama law provided the jury in considering an award of punitive damages. The *Haslip* jury was told that the purpose of punitive damages was "not to compensate the plaintiff" but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future," and that the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." 59 U.S.L.W. at 4162. This instruction limited the jury's discretion to deterrence and retribution, the state interests sought to be addressed, because it enlightened the jury as to the nature and purpose of punitive damages and identified the damages as punishment for civil wrongdoing. *Id.*

The punitive instruction given the jury in this case is reprinted at Appendix M. Although the instruction does mention the goals of punishment and deterrence, the isolated reference to these purposes is so oblique as to be meaningless. In light of the repeated references to willful or reckless conduct in the instruction, the single mention of punishment is no more than a

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5 *Haslip* noted that the review conducted by the Alabama Supreme Court had "real effect" and did result in the reduction of punitive awards. 59 U.S.L.W. at 4162. In contrast, the factual review of punitive damage awards in Texas is limited to intermediate appellate courts, and the Texas Supreme Court, by statute, has no jurisdiction to review the excessiveness of punitive damage awards. *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986). The Texas Supreme Court is therefore unable to provide a source of effective and consistent review of punitive awards similar to the function served by the Alabama Supreme Court.

call for vengeance. The jury's discretion was not channeled toward the purposes the state sought to advance, but was left free to roam toward any extreme the jury may have found.

The jury was told to consider "the totality of the circumstances," but was also told that "you may consider the financial resources of the defendant in fixing the amount of [punitive] damages." This was a correct statement of Texas law. *See Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988). This is directly contrary to the Alabama rule reviewed in *Haslip*, which excludes evidence of a defendant's wealth. 59 U.S.L.W. at 4162. Unlike Alabama law, Texas plaintiffs are entitled by law to "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.*

The constitutional calculus that must be undertaken in reviewing punitive awards is necessarily complex and imprecise. *Haslip* teaches that the guiding principles in such an analysis are "concerns of reasonableness and adequate guidance from the court." 59 U.S.L.W. at 4161. These due process requirements become magnified in the context of repeated punitive damage awards against a single defendant, a problem which has troubled the federal courts for a great many years. The very safeguards that provided constitutional validation for the Alabama system reviewed in *Haslip* were not afforded Celotex by the law or the courts of Texas. Due process requires more than Texas gives a defendant faced with serial punitive damage awards for a single course of conduct.

CELOTEX'S PETITION TO THIS COURT WAS TIMELY

Respondents allege, without argument or authority, that Celotex's petition to this Court was untimely. Celotex set forth in its Petition the facts that establish that the time for filing Celotex's petition under 28 U.S.C. § 2101(c) was extended by 11 U.S.C. § 108(c).

By its express language, 11 U.S.C. § 108(c) provides that if applicable nonbankruptcy law fixes a period for "continuing a civil action ... on a claim against the debtor," the period does not expire until thirty days after the automatic stay of 11 U.S.C. § 362 is terminated. Because Celotex was the defendant in the trial court, the proceeding before this Court is a continuation of a claim against a debtor. *See Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983); *Association of St. Croix Condominium Owners v. St. Croix Hotel*, 682 F.2d 446 (3rd Cir. 1982). The automatic stay in favor of Celotex was terminated by order of the bankruptcy court on January 10, 1991, App. F, and Celotex filed its petition within the time extended by 11 U.S.C. § 108(c).[6]

Respondents do not suggest any reason why 11 U.S.C. § 108(c) does not apply in this case. If a debtor such as Celotex is not allowed an extension of time, the "fresh start" policy of the Bankruptcy Code would be undercut because the debtor would be denied the time and opportunity to analyze the litigation against it and how to determine how those claims should be handled in the context of a reorganization. Celotex is entitled to the extension of time granted by Congress in § 108(c).

CELOTEX DID NOT JUDICIALLY ADMIT THE PRODUCT EXPOSURE OF ROY MARBLE

Respondents' argument on whether a statement by counsel for Celotex in closing argument constituted a judicial admission misses the crucial distinction between an unqualified statement of counsel, such as in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S.261 (1880), and the use during closing argument of evidence admitted over objection, such as *Clark v. City of Los*

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6 Under § 108(c), the deadline for filing a certiorari petition was extended until Saturday, February 9, thirty days after the stay was terminated. Because of the weekend dates, the deadline was extended until Monday, February 11, 1991. Sup. Ct. R. 30.1; Bankr. R. 9006. Celotex filed its petition for writ of certiorari on that date.

Angeles, 650 F.2d 1033 (9th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). *Clark* is the factually analogous precedent that should control in this case, and the decision below conflicts with *Clark*.

Respondents apparently recognize that the statement of counsel for Celotex was not an admission, for most of their argument is spent in trying to make the disputed product list admissible. Respondents suggest that the product list was admissible under Federal Rules of Evidence 804(b)(2), 804(b)(5), and 1006. None of those theories of admissibility were offered by Respondents in the trial court, and they cannot be raised at this late stage. Even if they could, they do not support admissibility of the list.

Rule 804(b)(2) allows an out-of-court statement to be admitted only if the declarant believed that his death was "imminent." There was no evidence at trial that Mr. Marble believed his death was imminent, and Respondents admit that the product list was prepared "for this lawsuit." Brief in Opposition at 16. The product list is not the type of death bed declaration required by Rule 804(b)(2). Rule 804(b)(5) is the catch-all exception that requires "guarantees of trustworthiness." Respondents offered no guarantees that the sources of information in the product list were reliable, and the trial judge recognized that the list had "a serious credibility problem." Tr. 1165. Rule 1006 allows the introduction of voluminous writings or recordings, but the product list is not a summary of any such documents.

Respondents also stress that Celotex failed to attack the reliability of the product list. This is a phantom issue that does not relate to judicial admissions or to admissibility. However, Celotex was unable to credibly attack the reliability of the product list because it had no chance to examine the original handwritten list, to cross-examine Mr. Marble, or to cross-examine the persons who provided the information on the list to Mr. Marble. It is precisely these inabilities that support the policies underlying the hearsay rule.

What Respondents did was to convince the trial court to allow an unverified, triple hearsay document into evidence, without giving Celotex any opportunity to test the truth of the document. Celotex was forced to admit the existence of that document during closing argument, and Respondents are now trying to use a trial by ambush as a judicial admission. There is nothing in the logic or history of judicial admissions in federal court that would condone such a result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing has been forwarded to opposing counsel:

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by certified mail, return receipt requested on this 10th day of May, 1991.

Kevin F. Risley by b/v
Kevin F. Risley

APPENDIX M

The plaintiffs claim that the acts (previously defined) of each of the defendants was done willfully, intentionally, or with a callous or reckless disregard and indifference to the rights and welfare of the plaintiffs, and that such conduct entitles them to an award of punitive damages in addition to the compensatory damages.

I instruct you, that under the laws of Texas, a heedless and reckless disregard means more than a momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it. In their claim for punitive damages, the plaintiffs claim, generally, that the defendants acting individually, or in conjunction with or in conspiracy with other asbestos manufacturing companies, willfully, intentionally, or with reckless indifference, withheld from the plaintiffs as well as from the public in general, information as to the dangers and potentially deadly nature of asbestos products, long after each of the defendants had actual knowledge of the dangers connected with the use of its products.

The plaintiffs also contend that this action on the part of the defendant, either individually or collectively, continued for many years and was knowingly designed by each of the defendants to cause the plaintiffs and their household members and other similarly situated workers to remain ignorant of the nature of their asbestos products.

If you find for the plaintiffs, and if you further find that any of the defendants did act with malice, willfulness, intentionally or with a heedless and reckless disregard or indifference to the rights of

others, the law would allow you, in your discretion to assess punitive damages against the defendant as punishment and as a deterrent to others.

In making your determination as to punitive damages, you will consider the totality of the circumstances and that you may consider the financial resources of the defendant in fixing the amount of such damages.

Tr. Vol. X, pp. 2488-2491.